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Nos. 07-1286 and 07-1287

In the Supreme Court of the United States

W.R. GRACE & COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

HENRY A. ESCHENBACH, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Clean Air Act's inclusion of "asbestos" in its list of hazardous air pollutants, 42 U.S.C. 7412(b)(1), provides an independent definition and gives fair notice of its scope in a criminal prosecution charging defendants with "knowingly releas[ing] into the ambient air [a] hazardous air pollutant listed pursuant to section 7412," and knowing at the time of the release "that [they] thereby place[] another person in imminent danger of death or serious bodily injury" in violation of 42 U.S.C. 7413(c)(5)(A).

2. Whether the knowing endangerment object of the Clean Air Act conspiracy count in the superseding indictment was timely filed pursuant to 18 U.S.C. 3288, which allows the government six months to reindict whenever an indictment is dismissed for any reason after the applicable statute of limitations has expired, except "where the reason for the dismissal was the failure to file the indictment or information within the period prescribed by the applicable statute of limitations, or some other reason that would bar a new prosecution."

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-42a) is reported at 504 F.3d 745.[1] The relevant orders of the district court are reported at 455 F. Supp. 2d 1122 (Pet. App. 45a-65a) and 455 F. Supp. 2d 1113 (Pet. App. 66a-83a).

[1] All references to "Pet. App." are to the appendix filed in No. 07-1287.

JURISDICTION

The judgment of the court of appeals was entered on September 20, 2007. A petition for rehearing was denied on December 5, 2007 (Pet. App. 43a-44a). On February 14, 2007, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including April 14, 2008, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners, W.R. Grace and six former company officials, are charged by superseding indictment with conspiring (1) knowingly to release asbestos, a hazardous pollutant, into the ambient air, thereby knowingly placing persons in imminent danger of death or serious bodily injury, in violation of the Clean Air Act, 42 U.S.C. 7413(c)(5)(A) (knowing endangerment object), and (2) to defraud the United States by impairing, impeding, and frustrating the government functions of its agencies, in violation of 18 U.S.C. 371 (defrauding object). Pet. App. 104a-149a. Petitioner W.R. Grace and certain individual petitioners also are charged, *inter alia*, in several counts with knowing endangerment in violation of 42 U.S.C. 7413(c)(5)(A). The superseding indictment alleges that petitioners distributed asbestos-contaminated vermiculite from the company's mining and processing operations for a variety of public and private uses by the people of Libby, Montana, even though they knew the devastating health effects that would result from exposure to the asbestos, including asbestosis and mesothelioma. Pet. App. 118a-149a.

On pretrial motions, the district court concluded that "asbestos" for purposes of this criminal prosecution

should be defined in accordance with a regulatory definition promulgated by the Environmental Protection Agency (EPA), rather than its statutory definition, and accordingly held that it would exclude evidence not limited to the narrower regulatory definition. Pet. App. 45a-65a. The district court also dismissed the knowing endangerment object in the conspiracy count as time-barred. *Id.* at 66a-83a. The court of appeals reversed those pretrial rulings and remanded to the district court for further proceedings. *Id.* at 1a-42a.

1. The Clean Air Act makes it unlawful to knowingly endanger another person through the release of listed hazardous air pollutants. See 42 U.S.C. 7413(c)(5)(A). This provision, added by Congress in the 1990 amendments to the Act, states in relevant part:

> Any person who knowingly releases into the ambient air any hazardous air pollutant listed pursuant to section 7412 of this title * * *, and who knows at the time that he thereby places another person in imminent danger of death or serious bodily injury shall, upon conviction, be punished by a fine under Title 18, or by imprisonment of not more than 15 years, or both.

Ibid.

Section 7412(b)(1) provides a list of hazardous air pollutants by their chemical names and in most cases by their corresponding Chemical Abstract Service (CAS) numbers. 42 U.S.C. 7412(b)(1). In 1990, at the same time Congress added the crime of knowing endangerment to the Act, it amended Section 7412(b)(1) to add 192 hazardous air pollutants, referring to the pollutants for the first time by their CAS number. Clean Air Act Amendments of 1990, Pub. L. 101-549, § 301, 104 Stat.

2532. One of those pollutants was the chemical "Asbestos" with its CAS number 1332214. *Ibid.* The CAS registry defines "1332-21-4 Asbestos" as "[a] grayish noncombustible fibrous material. It consists primarily of impure magnesium silicates." See EPA, *Substance Registry System* (visited May 23, 2008) <http://iaspub.epa.gov/srs/srs_proc_qry.navigate?P_SUB_ID=85282>.[2] While there are many varieties of asbestos—many with their own unique CAS number, Further E.R. (F.E.R.) 386—the general description in CAS number 1332214 captures all forms of asbestos that satisfy the CAS Registry's definition of asbestos. That general definition has been established for decades. See Pet. App. 17a.

In addition to the criminal knowing endangerment provision above, the Clean Air Act contains a variety of provisions for controlling the release of listed hazardous air pollutants into the ambient air. For example, for major sources and area sources of listed hazardous

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[2] The Chemical Abstract Service is a division of the American Chemical Society, a non-profit scientific and educational organization. See generally *American Chem. Soc'y* v. *United States*, 438 F.2d 597, 597-600 (Ct. Cl. 1971). The Society's CAS Registry assigns unique numeric identifiers to chemical compounds. *Ibid.* In addition to Congress's use of the CAS Registry in Section 7412(b)(1), federal agencies also frequently use the CAS Registry for identifying chemical substances. See, *e.g.*, 15 C.F.R. 712.6; 21 C.F.R. 170.35; 40 C.F.R. 302.4. EPA maintains on its website a free, searchable "Substance Registry System" containing CAS Registry information, which includes the definition of asbestos with CAS number 1332214. See EPA, *Substance Registry System* (visited May 23, 2008) <http://www.epa.gov/srs/> (search "asbestos"; follow link associated with 1332-21-4); see also 44 Fed. Reg. 28,559-28,560 (1979) (announcing public availability of the Initial Inventory of Chemical Substances compiled under section 8(a) and (b) of the Toxic Substances Control Act and discussing importance of use of CAS numbers to identify chemical substances in the inventory).

air pollutants, the Act directs EPA to "promulgate regulations establishing emission standards." 42 U.S.C. 7412(d). These emission standards are known as the National Emission Standards for Hazardous Air Pollutants (NESHAPs). The asbestos NESHAPs are found at 40 C.F.R. 61.140 *et seq.* In 40 C.F.R. 61.141, EPA defined asbestos as limited to five commercially valuable forms of asbestos: "the asbestiform varieties of serpentinite (chrysotile), riebeckite (crocidolite), cummingtonite-grunerite, anthophyllite, and actinolite-tremolite." 40 C.F.R. 61.141.[3] But EPA expressly provided that that definition applies only to the NESHAP regulatory program. See 40 C.F.R. 61.140 (providing that "[t]he provisions of this subpart are applicable to those sources specified"). It is undisputed that petitioners' Libby operations were not a regulated source of asbestos for NESHAP purposes.[4]

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[3] EPA's original NESHAP definition of asbestos, enacted in 1973, included six varieties of asbestos minerals. See 38 Fed. Reg. 8829 (1973) (defining "asbestos" to mean "actinolite, amosite, anthophyllite, chrysotile, crocidolite, [and] tremolite"). In 1984, EPA amended the NESHAP definition to its current form. See 49 Fed. Reg. 13,661 (1984) (defining "asbestos" to mean "the asbestiform varieties of serpentinite (chrysotile), riebeckite (crocidolite), cummingtonite-grunerite, anthophyllite, and actinolite-tremolite"). Although the current NESHAP definition identifies only five varieties of asbestos minerals, it is often still referred to as the "six-species" definition.

[4] The NESHAP asbestos regulations exclude petitioners' Libby operations in two respects. First, they exclude mining operations as a covered source. See 38 Fed. Reg. 8821 (1973). Second, they cover only "commercial asbestos," to "make it clear that materials that contain asbestos as a contaminant only are not covered." 39 Fed. Reg. 15,397 (1974). Petitioners acknowledged below that the asbestos NESHAPs do not apply to their Libby operations. Pet. App. 50a; E.R. 453 ("[Petitioner] Grace's Libby mine was not a regulated source under [40 C.F.R.] § 61.140 and was therefore not subject to the civil regulatory

2. On February 7, 2005, a federal grand jury returned a ten-count indictment charging petitioners, W.R. Grace and six of its officials, with criminal conduct in the mining, processing, and marketing of vermiculite contaminated with asbestos in and around Libby. E.R. 1-49.[5] The indictment alleged that petitioners conspired from approximately 1976 to 2002: (1) knowingly to release asbestos, a hazardous pollutant, into the ambient air, thereby knowingly placing persons in imminent danger of death or serious bodily injury, in violation of 42 U.S.C. 7413(c)(5)(A); and (2) to defraud the United States by impairing, impeding, and frustrating the government functions of its agencies, in violation of 18 U.S.C. 371. E.R. 15. In addition to that two-object conspiracy count, the indictment contained three substantive counts against W.R. Grace and certain individual petitioners for knowing endangerment under the Clean Air Act, 42 U.S.C. 7413(c)(5)(A); two counts of wire fraud, 18 U.S.C. 1343 (later voluntarily dismissed); and four counts of obstruction of justice, 18 U.S.C. 1505. E.R. 43-49.

3. The district court set a "firm" trial date of September 11, 2006. E.R. 51. Before trial, petitioners filed approximately 70 substantive motions seeking various forms of relief from the district court.

a. As relevant here, petitioners moved to exclude all evidence and testimony "that contains, is based on, or relies on sample results that fail to distinguish between fibers from minerals legally classified as 'asbestos,' and those that are not." CR-05-07-M-DWM Docket entry

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emissions standards established under that subpart.").

[5] The indictment charged a seventh company official who has since died.

No. 474, at 19 (D. Mont. May 31, 2006). Petitioners contended (*id.* at 12-15) that the term "asbestos" included only those minerals listed in the NESHAP regulatory definition of asbestos for certain commercial sources of asbestos emissions. See 40 C.F.R. 61.141. Petitioners' motion cited an excerpt from a government expert's study that stated approximately 84% of the asbestos at the Libby mine could be classified as winchite, 11% richterite, and 6% tremolite. See CR-05-07-M-DWM Docket entry No. 474, at 3 (D. Mont. May 31, 2006).

On August 7, 2006, the district court held that it would instruct the jury using petitioners' proposed narrow NESHAP regulatory definition of asbestos. Pet. App. 45a-65a. In so doing, the district court rejected the government's argument that asbestos, in all of its forms, is covered by the plain terms of 42 U.S.C. 7412(b)(1) as a hazardous air pollutant, and as such its knowing release in a manner that would knowingly endanger another person was a criminal act. Pet. App. 59a. The court also rejected (*id.* at 56a-57a) the government's argument that the definition in the NESHAP regulations did not apply because that definition only reaches regulated sources of emissions (and the parties agree Libby is not a regulated source, *id.* at 50a; see note 4, *supra*). The court concluded that the statute was ambiguous, and it resorted to the rule of lenity in limiting the definition of asbestos to the species listed in the regulations. *Id.* at 61a-63a. As a result of its holding, the district court excluded "any sampling data that commingles the minerals making up what the government calls 'Libby amphibole,' without differentiating between minerals covered by the Clean Air Act and minerals not covered." *Id.* at 63a.

b. Petitioners also moved to dismiss the knowing endangerment object of the conspiracy count, arguing

that the government failed to allege an overt act in furtherance of that object that fell within the applicable statute of limitations period. Pet. App. 4a-5a. The government disputed petitioners' characterization of the indictment, contending that certain of the alleged overt acts falling within the limitations period pertained to both the knowing endangerment and the defrauding objects of the conspiracy. *Id.* at 5a. On June 8, 2006, the district court, after examining those overt acts, concluded those acts "more plausibly suggest[] a completed operation than a conspiracy still at work," *id.* at 101a, and thus were done solely in furtherance of the defrauding object. See *id.* at 93a-103a. It therefore dismissed "with prejudice" the knowing endangerment object as time-barred. *Id.* at 103a.

On June 26, 2006, less than three weeks after the district court's order, the grand jury returned a superseding indictment. Pet. App. 104a-154a. The superseding indictment included a conspiracy count alleging the same objects and overt acts in furtherance of those objects as included in the original indictment, but it clarified that certain overt acts falling within the applicable statute of limitations period were alleged to have furthered both the defrauding and the knowing endangerment objects of the conspiracy. Pet. App. 6a; see *id.* at 69a-71a & n. 5 (describing changes).

Petitioners moved to dismiss the superseding indictment. The district court agreed with the government that the superseding indictment cured the deficiency the court had perceived in the original indictment because the superseding indictment, "while alleging the same facts, places them in a different context, making clear the government's theory that the acts in Paragraphs 173-183 were done in part in furtherance of the knowing

endangerment object." Pet. App. 73a. It thus concluded that the superseding indictment would have survived petitioners' original motion to dismiss. *Id.* at 71a-77a. The district court nevertheless rejected (*id.* at 77a-83a) the government's contention that the superseding indictment was timely under 18 U.S.C. 3288. Section 3288's savings clause generally provides the government six months to file a new indictment after a previous indictment is dismissed for any reason after the applicable statute of limitations has expired. See 18 U.S.C. 3288. The exception is that the statute "does not permit the filing of a new indictment * * * where the reason for the dismissal [of the previous indictment] was the failure to file the indictment * * * within the period prescribed by the applicable statute of limitations, or some other reason that would bar a new prosecution." *Ibid.* The court reasoned that Section 3288 did not save the superseding indictment because the original indictment "failed to allege an overt act in furtherance of the knowing endangerment object within the limitations period." Pet. App. 81a.

c. The government appealed those rulings, among others, pursuant to 18 U.S.C. 3731, and sought a writ of mandamus with respect to another order. The district court postponed trial pending appellate review. E.R. 472-473, 524-525.

4. The court of appeals affirmed in part, reversed in part, remanded in part, and granted a writ of mandamus on one issue. Pet. App. 1a-42a.

a. As relevant here, the court of appeals held that the statutory description of asbestos in 42 U.S.C. 7412(b), *i.e.*, "CAS number * * * 1332214 Asbestos," controls for purposes of the Clean Air Act's knowing endangerment crime. Pet. App. 15a-16a. The court re-

jected the district court's conclusion that that statutory description failed to provide petitioners with fair notice of their criminal conduct. *Id.* at 16a-19a. The court reasoned that, "[w]hen Congress does not define a term in a statute," the term should be construed "according to its ordinary, contemporary, common meaning." *Id.* at 16a (citation omitted). The court noted that the term "asbestos" has a common meaning, and that the statute incorporated by reference the CAS Registry definition, which "has been established for decades." *Id.* at 16a-17a. The court of appeals concluded that because the statute adequately defined "asbestos," the statute "need not include mineral-by-mineral classifications to provide notice of its hazardous nature, particularly to these knowledgeable defendants." *Id.* at 19a-20a.

The court further concluded that the district court erred in applying the rule of lenity "simply because of the existence of two oversight structures." Pet. App. 18a. The court observed that the NESHAP regulatory system "regulates major sources of hazardous air pollutants, 42 U.S.C. § 7412(c)-(g), and therefore understandably focuses on a subset of asbestifo[r]m minerals deemed to have commercial potential," whereas "[t]he direct enforcement mechanism created in 42 U.S.C. § 7413 focuses on risks to health" and therefore "provides oversight of release of hazardous pollutants whether or not they come from major sources of pollution." Pet. App. 19a. It therefore concluded that the district court erred in conflating the two enforcement mechanisms by importing into the knowing endangerment provision the definition of asbestos from the NESHAP regulations that, even in the context of the NESHAP regime itself, applies only to very limited and specifically

enumerated regulated sources of asbestos emissions. *Id.* at 19a-20a.

b. The court also reversed the district court's order dismissing as "time-barred" the knowing endangerment object of the conspiracy count, concluding that the district court misapprehended the savings clause of 18 U.S.C. 3288. Pet. App. 13a. While Section 3288 "does not permit the filing of a new indictment or information where the reason for the dismissal was the failure to file the indictment or information within the period prescribed by the applicable statute of limitations," 18 U.S.C. 3288, the court observed that, "there is no dispute that the government *filed* its [original] indictment within the statute of limitations period." Pet. App. 8a-9a. Instead, "[t]he district court dismissed the knowing endangerment object in the original indictment as 'time-barred,' because [the government] failed to allege an overt act within the statute of limitations, not because the indictment was untimely filed." *Id.* at 9a. The court of appeals concluded that the "failure to allege the necessary overt acts in the original indictment" was "a flaw that can be cured through re-indictment under § 3288." *Id.* at 11a. The court rejected the notion that this result was unfair because it extended the statute of limitations, reasoning that that "is exactly what § 3288 does": "[i]t extends the statute of limitations by six months to allow the prosecution a second opportunity to do what it failed to do in the beginning: namely, file an indictment free of legal defects." *Id.* at 12a-13a.

ARGUMENT

Petitioners seek review of the court of appeals' conclusions that: the statutory term "asbestos" in the Clean Air Act, rather than an EPA regulatory definition, gov-

erns prosecutions for knowingly releasing asbestos with knowledge that the release will endanger other persons; the statutory definition provides fair notice and avoids rule-of-lenity concerns; and the superseding indictment tying the originally alleged overt acts more explicitly to the knowing endangerment object of the conspiracy was timely under 18 U.S.C. 3288, following the dismissal of the original indictment for failing to draw that connection. None of those claims has merit or implicates a circuit conflict; and all arise in the posture of an interlocutory appeal. Further review is unwarranted.

1. This Court's review is unwarranted for the threshold reason that the interlocutory posture of the case "alone furnishe[s] sufficient ground for the denial" of the petitions. See *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); *VMI* v. *United States*, 508 U.S. 946 (1993) (Scalia, J., concurring). This Court routinely denies petitions by criminal defendants challenging interlocutory determinations that may be reviewed at the conclusion of the criminal proceedings. See Robert L. Stern et al., *Supreme Court Practice* § 4.18, at 258 n.59 (8th ed. 2002). That general practice enables the Court to examine any legal issues presented on a full trial record, and it also prevents unnecessary delays in the trial process.

That procedure should be followed here. The court of appeals' decision places petitioners in the same position that they would have occupied if the district court had denied their pretrial motions. If, after trial, they are acquitted of the relevant counts, there will be no occasion or need for review of the court of appeals' decision. And if they are convicted on those counts, petitioners may appeal the district court's final judgment, raising any issues available to them and preserving the is-

sues raised in these petitions. If the court of appeals affirms, they may then present to this Court any remaining claims in the full context of the evidence presented at trial, the instructions submitted to the jury, and the sentence ultimately imposed. See *Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001) ("we have authority to consider questions determined in earlier stages of the litigation where certiorari is sought from the most recent of the judgments of the Court of Appeals"). The benefit of that course is highlighted by the fact that unresolved factual issues could bear on the issues presented in these petitions. See pp. 13-14, *infra*. Thus, even if this Court's review were warranted (which it is not), such review would be aided by the additional factual development that would occur at petitioners' criminal trial.

There also is a strong concomitant need to prevent any additional, unnecessary delay of the trial. Some witnesses and many victims of petitioners' alleged misconduct are dying from mesothelioma, asbestosis, and other asbestos-related diseases. See *United States* v. *W.R. Grace & Co.*, 429 F.3d 1224, 1226-1227 (9th Cir. 2005) ("We cannot escape the fact that people are sick and dying as a result of this continuing exposure."). As time passes, more witnesses will be unavailable to testify, and fewer victims will be able to attend the trial. Interlocutory review would therefore be prejudicial to the trial process and is not justified by any overriding need.

2. Even apart from its interlocutory posture, this case does not warrant review. Petitioners contend (07-1286 Pet. 9-22; 07-1287 Pet. 19-30) that the court of appeals erred in using the statutory definition of asbestos, instead of a regulatory definition of that term pro-

mulgated by the EPA for specific and limited purposes, and that the statutory definition fails to provide fair notice. Those claims are incorrect and review by this Court is not warranted.

a. As an initial matter, petitioners cannot establish on this pretrial record that the court of appeals' adoption of the statutory definition of asbestos causes them any prejudice. Petitioners assert that it does so on the ground that winchite and richterite, two primary components of the Libby asbestos, are not asbestos within the NESHAP regulatory definition. See 07-1286 Pet. 7, 12, 15-17, 19-20; 07-1287 Pet. 10, 16. But, as the government informed the court of appeals (Gov't C.A. Br. 33-34; Gov't Reply Br. 10-12), even if the NESHAP definition governed, the asbestiform minerals found in Libby that geologists identify as winchite and richterite would be classified as forms of tremolite or actinolite-tremolite that fall squarely within the NESHAP regulatory definition. See 40 C.F.R. 61.141 (defining asbestos to include "the asbestiform varieties of * * * actinolite-tremolite"). As the government's expert geologist has explained, the Libby asbestos "could, for purposes of regulation only, be considered equivalent to tremolite or soda-tremolite asbestos in accordance with current and past industrial terminology." E.R. 693. In fact, petitioners themselves referred to the asbestos from their mine as "tremolite" and "tremolite asbestos." See, *e.g.*, F.E.R. 5-6, 85, 397-411. They even organized a "tremolite committee" to deal with asbestos exposure issues and developed guidelines titled "Guidelines for Handling Tremolite Contamination in our Mines, Plants, and Products." CR-05-07-M-DWM Docket entry No. 213, Exhs. 89, 90 (D. Mont. Sept. 30, 2005). Thus, even under petitioners' preferred NESHAP definition, the Libby asbes-

tos is accurately classified as tremolite asbestos. That alone provides sufficient reason to deny review at this time.

b. In any event, the court of appeals' decision is correct. The plain text of the Clean Air Act criminalizes knowing releases of all "listed" hazardous air pollutants, where the release is knowingly made in a manner that endangers others. 42 U.S.C. 7413(c)(5)(A). The Act, in turn, lists "Asbestos," identified by CAS number 1332214, as a hazardous air pollutant. 42 U.S.C. 7412(b)(1). As the court of appeals recognized, Congress "incorporated by reference into § 7412(b)" the CAS definition of asbestos, which has been "established for decades." Pet. App. 17a. The CAS Registry defines asbestos number 1332214 as "[a] grayish non-combustible fibrous material. It consists primarily of impure magnesium silicates." EPA, *Substance Registry System* (visited May 23, 2008) <http://iaspub.epa.gov/srs/srs_proc_qry.navigate?P_SUB_ID=85282>. In view of the straightforward text of the statute, the court of appeals correctly held that the Act criminalizes knowing releases of all forms of asbestos that fall within the definition of CAS number 1332214. Pet. App. 15a-16a, 19a.[6]

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[6] Contrary to petitioners' suggestion, the court of appeals did not "devise its *own* definition of 'Asbestos,'" 07-1286 Pet. 13, but rather recognized that the statute incorporated the CAS number 1332214 definition. While the court also offered a shorthand "common meaning," Pet. App. 16a, the opinion clearly relied on the CAS registry definition, *id.* at 17a. Thus, whether the statute could in some cases reach "talc" or "fiberglass" (07-1286 Pet. 12)—a question that is not implicated on the facts alleged in this case—would turn on the CAS definition, not different language in the court's opinion. In any event, if the district court were to instruct the jury using a definition other than the CAS definition, and petitioners were convicted, they could raise that argument on appeal after final judgment.

Petitioners nevertheless contend (07-1286 Pet. 1, 9-11, 19; 07-1287 Pet. 20) that this Court's review is warranted because the court of appeals purportedly "decoupl[ed]," (07-1286 Pet. 3), the Act's criminal and civil provisions. Petitioners claim that, because the criminal provision in Section 7413(c)(5)(A) cross-references the list of hazardous air pollutants in Section 7412(b), any substance that is not within the reach of the Clean Air Act's civil provision is "not within the reach of the Clean Air Act's criminal provision." *Id.* at 10. To the contrary, as explained below, the court of appeals correctly distinguished the Clean Air Act's statutory provisions from one distinct, but not exclusive, regulatory program developed by EPA under the Act.

The NESHAP regulatory program, which was developed in the early 1970s, applies only to certain major sources and area sources of hazardous air pollutants for which it is feasible for EPA to set emission standards. See 42 U.S.C. 7412(d)(1); see also 42 U.S.C. 7412(b)(1)(B) (1988) (former provision granting EPA authority to promulgate emissions standards before the 1990 amendments). As the court of appeals recognized (Pet. App. 19a), EPA chose to regulate certain commercial sources involved in the production or handling of commercial asbestos and, as applied to those specific sources, defined asbestos to include the commercially valuable varieties of asbestos out of the broader universe of asbestiform varieties listed as hazardous air pollutants under the Act. See 40 C.F.R. 61.140 *et seq.* (National Emission Standard for Asbestos); 39 Fed. Reg. 15,397

(1974). But EPA did so only for purposes of the NESHAP regulatory regime. See 40 C.F.R. 61.140.[7]

By contrast, the Act's separate criminal knowing endangerment provision applies broadly to any release of a hazardous air pollutant—regardless of whether the release originates from a source covered under the NESHAP. See 42 U.S.C. 7413(c)(5)(A). Congress clearly intended for that provision to criminalize more than the commercially valuable varieties of asbestos regulated under EPA's NESHAP program. In 1990, when Congress added the knowing endangerment provision and made its prohibitions applicable to "hazardous air pollutants listed pursuant to section 7412," 42 U.S.C. 7413(c)(5)(A), it also amended Section 7412(b)(1) to add 192 hazardous air pollutants, including asbestos and its CAS Number 1332214.

Petitioners are thus wrong to suggest (07-1286 Pet. 10) that EPA's NESHAP definition of asbestos "simply flesh[es] out the definition[]" of asbestos provided by Congress in Section 7412(b)(1). The NESHAP regulatory definition predated Congress's addition of "CAS number * * * 1332214 Asbestos" to the statute by more than fifteen years. See 38 Fed. Reg. 8829 (1973). If Congress had desired to limit the knowing endangerment crime to regulated sources or to use regulatory definitions, it could easily have done so by either: (1) making the crime subject to an underlying regulatory violation as it did in the Clean Water Act, see 33

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[7] Although the court of appeals characterized the NESHAP program as a "civil regulatory system," Pet. App. 19a, and petitioners base their argument on a civil/criminal dichotomy supposedly created by the court of appeals' opinion, the NESHAP regulatory program may be enforced either civilly or criminally. See 42 U.S.C. 7413(c)(1) (criminal provision for knowing violations of NESHAP program).

U.S.C. 1319(c)(3)(A) (requiring violation of "permit condition or limitation"); or (2) listing the individual CAS numbers of each of the commercial types of asbestos, instead of the general CAS number for asbestos, as Congress did for specific types of xylenes in Section 7412(b)(1). Indeed, it could have simply set forth the NESHAP asbestos definition in the Act. Congress chose none of those alternatives.

To the extent that petitioners suggest (07-1286 Pet. 11) that the NESHAP regulatory definition is an exercise of the EPA's power under Section 7412(b)(2) to revise the definition of "asbestos" listed by Congress in Section 7412(b)(1), they are incorrect. Although the EPA has exercised its authority under that subsection with respect to other substances, see 40 C.F.R. 63.60-63.63, it has not done so with respect to asbestos. To the contrary, the NESHAP definition is explicitly limited to the NESHAP program promulgated under EPA's authority to establish emissions standards in Section 7412(d), 40 C.F.R. 61.140, which petitioners acknowledge does not apply to the Libby operations. See note 4, *supra*. The court of appeals correctly declined to engraft the NESHAP limitation onto the statute.

c. Petitioners renew their argument (07-1286 Pet. 15; 07-1297 Pet. 20-26) that the Act's prohibition against knowingly releasing "CAS number * * * 1332214 Asbestos" was insufficient to provide them with fair notice that the winchite and richterite forms of asbestos could not be released. The fair warning requirement precludes enforcement of "a statute which either forbids, or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally* v. *General Constr. Co.*, 269 U.S. 385, 391 (1926). But a law

need not spell out every possible application in the most precise possible language. See *United States* v. *Lanier*, 520 U.S. 259, 271 (1997) ("general statements of the law are not inherently incapable of giving fair and clear warning"); *Boyce Motor Lines* v. *United States*, 342 U.S. 337, 340 (1952) ("no more than a reasonable degree of certainty can be demanded").

The question is thus whether the statutory term "Asbestos," including Congress's explicit incorporation by reference of the CAS Registry identification number 1332214, "provide[s] a person of ordinary intelligence fair notice of what is prohibited," *i.e.*, of what substances fall within Section 7412(b)'s list of hazardous air pollutants. *United States* v. *Williams*, No. 06-694 (May 19, 2008), slip op. 18; see *Hill* v. *Colorado*, 530 U.S. 703, 732 (2000). The court of appeals correctly concluded (Pet. App. 15a-20a) that it does so, and that the statute "need not include mineral-by-mineral classifications to provide notice of its hazardous nature." *Id.* at 19a-20a. That is particularly true because asbestos as defined by reference to the CAS Registry has a sufficiently clear meaning in the relevant industry. See *Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 501 n.18 (1982) (rejecting vagueness challenge to the term "roach clip" because "that technical term has sufficiently clear meaning in the drug paraphernalia industry"); *Hygrade Provision Co.* v. *Sherman*, 266 U.S. 497, 502 (1925) ("[T]he term 'kosher' has a meaning well enough defined to enable one engaged in the trade to correctly apply it, at least as a general thing."); *Omaechevarria* v. *Idaho*, 246 U.S. 343, 348 (1918) (rejecting vagueness challenge regulating grazing on a "range" because "[m]en familiar with range conditions and desirous of observing the law will have little diffi-

culty in determining what is prohibited by it"). Petitioners' claimed reliance (07-1286 Pet. 21) on EPA's regulatory definition, rather than the statutory reference to the CAS, is particularly misplaced given that EPA defined the term asbestos only for the NESHAP program, and petitioners concede that the Libby mine was not subject to that program. See note 4, *supra*.[8]

If there were any fair notice concerns here, the presence of a culpable intent as a necessary element of the offense would eliminate them. See *Village of Hoffman Estates*, 455 U.S. at 499; *Boyce Motor Lines*, 342 U.S. at 342-343. The government will be required to prove at trial not only that petitioners knowingly released asbestos, but also that they knew that the releases would be placing others "in imminent danger of death or serious bodily injury." 42 U.S.C. 7413(c)(5)(A). These additional mental state requirements "do[] much to destroy any force in the argument that application of the [statute] would be so unfair that it must be held invalid." *Boyce Motor Lines*, 342 U.S. at 342; see *Williams*, No. 06-694, *supra*, slip op. 20 (the problem of "[c]lose cases"

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[8] While petitioners assert (07-1286 Pet. 13; 07-1287 Pet. 11) that CAS Registry information "can be accessed only by paid subscribers," EPA maintains on its website (as the court of appeals noted, Pet. App. 16a n.3), a free "Substance Registry System" containing CAS Registry information, including the CAS definition of "CAS number * * * 1332214 Asbestos" listed in Section 7412(b)(1). See <http://iaspub.epa.gov/srs/srs_proc_qry.navigate?P_SUB_ID=85282> (visited May 23, 2008). And, contrary to petitioners' suggestion (*e.g.*, 07-1286 Pet. 14), there is no constitutional problem in Congress's definition of "asbestos" by reference to its CAS number. Congress and federal agencies may adopt commercial standards, like those in the CAS Registry, that are "accepted and fairly stable." See *United States* v. *National Dairy Prods. Corp.*, 372 U.S. 29, 36 (1963) (quoting *Small Co.* v. *American Sugar Ref. Co.*, 267 U.S. 233, 240-241 (1925)).

is "addressed, not by the doctrine of vagueness, but by the requirement of proof beyond a reasonable doubt"). Accordingly, the fact that a jury cannot find petitioners guilty of knowing endangerment under the Act unless they *knew* they were releasing asbestos in a manner that would endanger others eradicates any fair notice concern petitioners might have here. Petitioners point to no conflict on the fair notice question, and the court of appeals' application of settled law does not warrant this Court's review.[9]

d. Contrary to petitioners' argument (07-1286 Pet. 17-18; 07-1287 Pet. 7), the court of appeals did not improperly rely on petitioners' subjective knowledge in rejecting their fair notice challenge. The court did refer to the allegations in the indictment about petitioners' knowledge of asbestos and its associated health risks. See Pet. App. 17a.[10] But the court's conclusion of fair notice did not depend on petitioners' knowledge gleaned from their longstanding position in the industry. Rather, the court made that observation "[i]n addition" to its earlier conclusion that the statute alone provided

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[9] For the same reasons, petitioners' reliance (07-1286 Pet. 18; 07-1287 Pet. 20-22) on the rule of lenity fails; the statute is not ambiguous. As the court of appeals noted (Pet. App. 17a), its decision rested on the "clear statutory language." See *Burgess* v. *United States*, 128 S. Ct. 1572, 1580 (2008).

[10] The superseding indictment is replete with allegations of petitioners' actual notice of the risks from the fibrous content of asbestiform minerals in their products, and the superseding indictment alleges, as part of the conspiracy, that petitioners knew of that risk since at least 1976. Pet. App. 118a-149a. Whether the government can prove petitioners' knowledge of the risks from the fibrous content of asbestiform minerals in their products beyond a reasonable doubt is, of course, "plainly a matter for proof at the trial." *Boyce Motor Lines*, 342 U.S. at 343.

fair notice. *Ibid.*; see *id.* at 19a-20a (concluding that asbestos was adequately defined, "particularly to these knowledgeable [petitioners]"). Because the court of appeals' decision turned on the "clear statutory language," *id.* at 17a, its passing reference to petitioners' actual knowledge was at most dictum.[11]

3. The individual petitioners contend (07-1287 Pet. 31-38) that the court of appeals erred in concluding that the superseding indictment was timely filed pursuant 18 U.S.C. 3288 after the district court dismissed the knowing endangerment object of the conspiracy in the original indictment. The court of appeals' decision is correct, and petitioners' factbound claim of error does not warrant this Court's interlocutory review.

Section 3288 provides that "[w]henever an indictment or information charging a felony is dismissed for any reason after the period prescribed by the applicable statute of limitations has expired, a new indictment may be returned in the appropriate jurisdiction within six calendar months of the date of the dismissal of the in-

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[11] The individual petitioners (07-1287 Pet. 26-30), but not the company petitioner, claim that the court of appeals' consideration of petitioners' subjective knowledge is "at odds" with decisions in other circuits. There is no conflict. As in the cases cited by petitioners from other circuits, the court below recognized that the statute had to be interpreted according to its "ordinary, contemporary, common meaning." Pet. App. 16a-17a. In addition, other decisions from the Ninth Circuit apply the approach advocated by the individual petitioners, making clear that there is no conflict in the circuits that requires this Court's resolution. See, *e.g.*, *United States* v. *Approximately 64,695 Pounds of Shark Fins*, 520 F.3d 976, 980 (2008) (observing that "[t]o provide sufficient notice, a statute or regulation must 'give the person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly'") (quoting *Grayned* v. *City of Rockford*, 408 U.S. 104, 108 (1972)).

dictment or information." 18 U.S.C. 3288. Any such "new indictment shall not be barred by any statute of limitations." *Ibid.* That savings clause, however, does not permit the filing of a new indictment or information "where the reason for the dismissal was the failure to file the indictment or information within the period prescribed by the applicable statute of limitations, or some other reason that would bar a new prosecution." *Ibid.* Here, the government returned a new indictment within three weeks of the dismissal of the original indictment—well within the six-month time-frame provided by statute. Pet. App. 6a, 13a.

The individual petitioners nevertheless argue (07-1287 Pet. 31-38) that the superseding indictment was not authorized by the savings clause because (they assert) the government untimely filed the original indictment and therefore the last sentence of Section 3288 barred reindictment. As both the district court and the court of appeals recognized, however, the original indictment was timely filed. See F.E.R. 549 (district court: "the entire indictment was brought within the statute of limitations"); Pet. App. 8a-9a (court of appeals: "there is no dispute that the government *filed* its indictment within the statute of limitations period").

Contrary to the individual petitioners' suggestion, the flaw that the district court identified in the original indictment was not untimeliness, but a perceived pleading deficiency, namely, the failure to sufficiently link the overt acts alleged in the indictment to the knowing endangerment object. Pet. App. 100a-103a. Tellingly, petitioners omit the district court's subsequent conclusion that the superseding indictment "would have survived [petitioners'] first motion to dismiss" because, "while alleging the same facts, [it] places them in a different

context." *Id.* at 73a. Under the circumstances here, the court of appeals correctly held that the superseding indictment was timely under Section 3288's plain terms, because the reason for the dismissal was not "the failure to file the indictment or information within the period prescribed by the applicable statute of limitations, or some other reason that would bar a new prosecution." 18 U.S.C. 3288. Petitioners point to no circuit decision holding otherwise, and the government is aware of none.

This conclusion does not, as the individual petitioners contend, "destroy[] statutory repose for criminal defendants." See 07-1287 Pet. 36 (capitalization removed). Rather, the very purpose of Section 3288 is to allow what the government did here. As the court of appeals concluded, its interpretation of Section 3288: (1) "eliminates the incentive for criminal defendants to move for dismissal of an indictment at the end of the statute of limitations, thereby winning dismissal at a time when the government cannot re-indict"; and (2) "subjects defendants to the threat of prosecution for six months after the dismissal of the original indictment—not an indefinite threat of prosecution as [petitioners] suggest[]—and only if the government has timely filed an indictment charging the exact same crimes based on approximately the same facts." Pet. App. 13a.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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